

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Federal-State Joint board on)	CC Docket No. 96-45
Universal Service)	
)	
Federal-State Joint Board on Universal)	
Service Seeks Comment on Proposals to)	FCC 05J-1
Modify the Commission's Rules Relating)	
To High-Cost Universal Service Support)	

Comments of Texas Statewide Telephone Cooperative, Inc.

I. Introduction

Texas Statewide Telephone Cooperative, Inc.¹ (TSTCI) respectfully submits these comments in the above-captioned proceeding. In this proceeding the Federal-State Joint Board on Universal Service (Joint Board) seeks comments on four proposals that several Joint Board members and state staff members developed to address issues related to universal service support and the basis of support for competitive eligible telecommunications carriers (ETCs). TSTCI appreciates the efforts that the Joint Board and staff members have made to propose potential modifications to the universal service support mechanisms and distribution of support as solutions for addressing important issues raised by the Commission.

Many of the proposals have merit and should be further examined. TSTCI has reviewed the proposals from the vantage point of rural incumbent local exchange companies (ILECs) whose challenge is providing quality service in the rural high cost areas of Texas.

TSTCI member companies provide local exchange service to approximately 170,000 consumers that are spread over approximately 50% of the geographic area of Texas. The customer density of TSTCI companies' service areas range from less than one customer per route

¹ TSTCI is an association representing 20 telephone cooperatives and 18 small, rural commercial telephone companies operating in Texas. The current membership in TSTCI is listed in Appendix A.

mile to six customers per route mile. The areas served by the rural TSTCI companies include sparsely populated ranching and farming areas that have diverse and rugged terrains.

Most TSTCI member companies rely heavily upon federal universal service support funds for recovery of their overall cost of providing service. For these reasons, TSTCI encourages the Joint Board to consider carefully its recommendations on universal service reform and only approve reforms that provide sustainable, predictable and sufficient support funds and that encourage the rural ILECs to continue to invest and provide advanced, quality services at affordable rates to rural customers.

TSTCI believes that any effort to reform the federal high-cost universal service support programs must be founded on the basic premise that the existing federal high cost universal service support programs are an integral part of overall cost recovery and promote national universal service public policy objectives incorporated in the Federal Telecommunications Act.² In addition, contrary to popular rhetoric, the existing rural ILECs' high-cost support programs are not subsidies or welfare plans, but were designed as an element of overall cost recovery.³

TSTCI submits that the high cost support programs should continue:

1. to ensure that rural ILECs can provide services at affordable and comparable rates in accordance with national universal service public policy objectives of Section 254 of the Federal Telecommunications Act;
2. to encourage rural ILECs serving high cost areas to invest in networks that can provide a broad range of telecommunications services as the definition of universal service evolves;

² That is, consumers, including those in rural high cost areas, should have access to telecommunications and information services that are reasonably comparable to those services provided in urban areas, at rates that are reasonably comparable to rates charged for similar services in urban areas. (Federal Telecommunications Act (the Act); Sec 254(b)(3))

³ TSTCI believes the current high cost support programs should not be considered subsidy programs, unlike the e-rate, Lifeline, and health care programs that could be considered subsidy for individual end user customers.

3. to be used to recover a reasonable amount of the costs rural ILECs incur in the provision of universal service in order to ensure that comparable and affordable end user rates and services can be maintained; and
4. to be based on embedded cost of providing the service.

Concurrent with universal service reform now being considered is proposed reform to access charges, or the intercarrier compensation (ICC), regime.⁴ TSTCI believes that effective reform of the universal service high cost support programs should take place concurrently with ICC reform. Only then can an accurate determination be made of the potential impacts to the rural ILECs and the customers they serve. Making changes to universal service funding and distribution methodology as proposed herein before ICC reform has been fully resolved may limit the Commission's ability to transition ICC changes as currently envisioned by many of the ICC proposals filed. It appears the authors of the State Allocation Mechanism (SAM) and the Three Stage Package Reform proposals recognize that universal service reform and ICC reform can not be separated and must be considered as a package. Because of the significant impacts on the overall revenue streams of the rural ILECs, TSTCI agrees these two issues must be interlocked and implemented in unison.

⁴ CC Docket No. 01-92, *In the Matter of Developing a Unified Intercarrier Compensation Regime*.

II. Delegation to States - Federal Decision-Making Authority

One of the primary considerations to be addressed with the Joint Board's Notice centers on whether the universal service distribution function should be delegated to the states. This issue raises legal concerns as to whether such delegation is permissible under law.

Under constitutional standards involving "separation of powers" and "non-delegation" of legislative functions, the courts have historically raised substantial concerns over this concept. Regulation is essentially a "legislative" function. Under both United States and Texas constitutional standards, the people delegate their democratic authority to elected officials by virtue of election; and those officials are supposed to "legislate" as directed by the people. As a broad, general rule, the courts will not allow the legislature to "re-delegate" the powers already once delegated to it by the people. As the world has become more complicated, and increasingly subject to regulation and technology, the courts have allowed Congress and the state legislatures to delegate to state and federal agencies, so long as the delegation was specific, express and clear, and not overlybroad so that the power of control is not too far removed from the public.

In this Notice, the Joint Board requested comments on whether to re-delegate its already once-delegated powers to a state agency that itself operates under delegated powers. This amounts to three or more levels of delegation. Given these considerations, this delegation may undergo strict scrutiny by the courts if challenged under the separation of powers doctrine and the non-delegation doctrine.

The Texas Supreme Court recently looked at this issue, and basically conformed Texas law with federal court decisions regarding delegation. The Texas Supreme Court summarized federal law into an eight-part test to determine when legislative and regulatory delegation is

permissible.⁵ If the Commission's delegation to the states is to be legally permissible, it is TSTCI's opinion that it must at least meet this same state and federal test.

Whether the Commission can delegate any or all of its areas of responsibility to the Texas Public Utility Commission, or any other state for that matter, the following test as expressed by the Texas Supreme Court should apply:

1. *Would state actions be subject to meaningful review by another branch of government?* That is: Is there a meaningful appeal process to the courts or to the FCC?
2. *Are the eventual high cost recipients adequately represented in the state decision making process?* The FCC should require state commissions to allow public comment through rule making, and to adhere to due process guidelines for contested hearings.
3. *Would the state power be limited to making rules only or would the Commission also delegate judicial-type contested proceedings to determine individual company funding?* The FCC should do both: allow some rule making applicable to all companies, but also allow contested cases to establish specific individual company need based on the actual costs of the company.
4. *Would the state commission have any conflict of interest in the delegation?* The FCC should not establish regional processes, that is, the Commission should not allow one state or a group of states to decide the high cost support distributions for other states because any one state or a group of states would be biased toward their own potential recipients. As discussed below, specific guidelines

⁵ See *Proctor v. Andrews*, 972 S.W.2d 729 (Tex. 1998), *Texas Boll Weevil Eradication Found. v. Lewellen*, 952 S.W. 2nd 454 (Tex. 1998), and federal cases and treatises cited therein.

should be established to prevent other forms of conflict of interest to occur or distributions made from a biased point of view.

5. *Would the state commission be empowered to define criminal or civil sanctions and to impose criminal or civil penalties?* The imposition of penalties, fines, criminal sanctions, needs to be reserved to the Commission. A potential legal problem could be created if the FCC broadly delegates its authority to impose penalties for non-compliance. The Commission must maintain compliance, auditing, and accountability responsibilities that were delegated to them from Congress.
6. *Is the delegation narrow in duration, extent and subject matter?* TSTCI believes the more narrow and specific the delegation, the better chance it will pass judicial test.
7. *Does the state commission possess special qualifications, training or expertise for the tasks delegated to it?* This is the easiest part of the test. The Commission clearly recognizes that state commissions are better qualified and have better knowledge to make high cost distributions within their states.
8. *Has the Commission provided sufficient and specific standards to guide state commissions in their work?* This is one of the most important criteria - the Commission must establish specific determination standards. For example, the Commission cannot provide a pot of money to a state commission to distribute as it wishes. The commission must establish specific criteria and process for the states to follow in a consistent manner. For example, the Commission could state that distributions will be based on individual company costs, used solely in high-cost, low-density rural areas and be subject to reporting requirements.

Each of the four Joint Board proposals contains at least some degree of delegation of decision-making authority to the states through block grants and state allocation/distribution mechanisms. On the surface, a state allocation methodology seems sound because states generally have a better sense of the conditions and issues in their states. However, TSTCI submits that being “too close” to state specific issues may deflect some states from the national perspective and vision necessary to enact a national universal service policy.⁶ In addition, state allocation plans, such as being proposed, may be more costly and burdensome to administer than the current mechanism, and will do little to reduce the size or growth of the universal service fund. Such proposals place the Commission in the role of regulating and auditing the states to ensure compliance and accountability. Delegation of authority to the states will most likely result in litigation involving the Commission, the states, and the many affected parties.

The state allocation proposals appear to allow significant discretion by the states to make their own allocations and distribution of federal support. If the Commission does not develop rules to establish specific instructions for consistent interpretation, state allocation plans will not be developed in a consistent manner, thereby jeopardizing national universal service policy objectives. If the Commission ultimately delegates allocation and distribution responsibilities to the states, the Commission must adopt very specific rules that will increase certainty among the parties that the method of determining allocations and the distribution of support is consistent, and that distribution options of the state commissions are limited. If the Commission determines it has the legal authority to delegate its distribution responsibilities, and the above test can be satisfactorily addressed, it must assign its delegation of authority with specificity and extreme caution.

⁶ For example, the URSERP and the Three Stage Package Reform plans indicate non-rural companies should possibly receive universal service support funds. TSTCI does not believe providing non-rural companies will result in added investments in the rural exchanges. In our opinion, providing support funds to non-rural companies will not change investment decisions.

III. Specific Points Regarding the Noticed Plans

A. Block Grants Discourage Investment

Although “block grants” are not fully defined nor are their revenues impacts identified in the Noticed plans, TSTCI has concerns regarding the “block grants” proposals that are part of the state allocation plans. TSTCI is concerned that block grants coupled with the possible changes to costing methodologies discussed below will discourage investment in rural areas. Replacing the existing federal high cost support mechanisms with block grants creates uncertainty for the rural ILECs, especially if the allocations and distributions are to be determined by the individual states without specific Commission guidelines. Those companies that have relied upon federal universal service support to recover substantial portions of their overall cost of providing service in rural areas, will be reluctant to make capital investments at the same levels being made today, if universal service support is not predictable.

For instance, the Holistically Integrated Package (HIP) proposes that the state allocation mechanism will take effect after a three year transition period. However, during that transition period, states would have authority to find that a carrier should receive less high cost support than what historical levels provided.⁷ The State Allocation Mechanism (SAM) proposes to designate the initial state allocation amounts for five years and possibly every five years thereafter.⁸ Plans such as these are not sufficient to create certainty and incentive for investment, given that investments such as loop plant, have cost recovery lives of fifteen (15) to twenty (20) years as approved by state regulatory agencies.

Block grants based upon statewide average costs have the potential of reducing or eliminating federal high cost support to the carriers that are most in need of it. Small rural carriers serving high-cost areas of a lower cost state may be adversely affected if the urban areas

⁷ HIP proposal, page 15

⁸ SAM proposal, pages 5 and 7.

of the state skew statewide costs. In Texas, the TSTCI companies serve approximately 50% of the geography but less than 2% of the customers. However, with urban centers like Dallas, Houston, and San Antonio, Texas' statewide average costs may be significantly less than the national average.⁹ In this case, the block grant proposals would shift federal high-cost support from states that currently receive support or from companies that receive support to those that do not today.¹⁰ The current federal procedures are more equitable and are better able to target support to the high-cost rural areas than block grants based upon individual statewide average costs.

B. Embedded Cost Methodology is Appropriate

The four proposals vary on the methodology to determine the cost of providing service which will be used to allocate support funds. The SAM and the HIP proposals leave it up to the Commission to decide whether embedded costs or forward-looking costs could be a factor for states to consider in making distributions. Unfortunately, without specific guidelines, there is the potential for states to abuse their delegated authority with regard to the costing methodology used.

TSTCI believes that embedded costs is the appropriate measure of the cost of providing service in rural areas — not forward - looking costs. Both embedded and forward-looking costs are current measures of costs.¹¹ As explained in the Rural Alliance filing, embedded cost uses accounting records reflecting historical costs to measure today's costs, while forward-looking cost uses current technology, input prices and industry procedures to measure today's costs.

Unlike embedded costs, which are circumscribed by both Commission rules and by the

⁹ The five-year average amount of invested capital for 44 rural Texas companies is \$2,350.00 per line, however, SBC's five-year average amount of invested capital is \$971.00 per line. The large disparity in average investment per line between the rural companies and the largest company in Texas shows how the statewide average cost can be skewed on a state-by-state basis.

¹⁰ The URSERP plan appears to have a hold harmless provision that prevents significant shifts to occur. TSTCI agrees that any approved changes should contain hold harmless provisions to limit significant shifts in high cost support.

¹¹ TSTCI supports the comments filed by the Rural Alliance regarding the appropriate costing standard beginning on page 34 of the Rural Alliance filing in the ICC proceeding.

accounting industry's Generally Accepted Accounting Principles, forward-looking costs are more subject to interpretation and are not observable. Different interpretations result in generally more disagreement regarding how forward-looking costs should be calculated.¹²

The Universal Service End Point Reform Plan (USERP) proposes embedded costs adjusted for ICC revenues, but with cost limitations through cost outputs of a "forward looking" costs model or with "best in class" standards. This proposal is of concern because "best in class" standards are not fully defined. One example was given relative to a cap on corporate operations expenses, with the supposition that a revised cap of this sort might impose stricter limits based upon a class of low-overhead companies. Although TSTCI supports the intent, which is stated as a means to limit costs in ways that reduce incentives for wasteful spending, TSTCI believes further definition of these standards is required.

TSTCI has stated in previous proceedings,¹³ and again reiterates that universal service support mechanisms should allow ETC's to recover their actual costs and support for competitive ETCs should not be based upon the costs of rural ILECs. The USERP plan recognizes the different cost characteristics between ETCs, particularly wireline and wireless carriers, and has proposed significant changes which should be effective in controlling the size and growth in the federal support fund. Today competitive ETCs receive high cost support on the basis of the ILEC's costs. This situation should end. ETCs should receive support based on the same standards and regulatory obligations which means that an individual company's support should be based on its own costs of providing service. TSTCI contends that high cost support should not be used to advance competition in rural areas.

¹² TSTCI points to the Rural Task Force examination of forward-looking costing models and the distorted results that occur when applied to rural areas. Any generic costing model, other than an actual embedded cost model, will produce anomalies in rural areas.

¹³ Reply Comments of Texas Statewide Telephone Cooperative, Inc.; *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, September 21, 2004

The Three Stage Package Reform proposal would retain embedded cost support for rural carriers serving less than 100,000 lines, and freeze per line support for the incumbent upon entry of a competitive ETC. Per line support would be based on each ETC's own costs, capped at per line support of the incumbent. As stated previously, TSTCI agrees that per line support should be based upon each ETC's own costs. The increased growth of the universal service fund is not attributable to the ILECs, as some parties espouse, but has been driven by the numerous competitive carriers that have received ETC designation, particularly wireless ETCs. Instead of receiving universal service support based upon an ILEC's cost, competitive ETCs should receive support based upon their own costs.

C. Freezing Support Upon Competitive Entry Violates the Act

TSTCI does not agree that an ILEC's per line support should be frozen upon entry of a competitive ETC. Rural ILECs have a continuing obligation to maintain and upgrade their network regardless of whether the ILEC loses lines to a competitive ETC. Competitive ETCs do not have carrier of last resort obligations or the requirement to demonstrate their costs and justify the need for support, as do the rural ILECs. Capping rural ILEC per-line support upon competitive entry would result in a funding shortfall for rural ILECs in violation of the Act's provision that support be predictable and sufficient. This action is also in conflict with recovery of legitimate costs that were lawfully approved by regulators. A plan that freezes support for specific companies based upon a point in time, then allocates that amount over a different set of companies, creates uncertainty and creates disincentives to invest for the rural ILEC whose support was frozen.

D. Rate Benchmark Should be Based on the Composite of the Nationwide Average Urban Rate, including Subscriber Line Charges (SLC)

The HIP plan proposes a permanent rate benchmark of 125% of the nationwide average urban rate, while the USERP plan proposes a permanent benchmark at 125% of the national

average urban cost (net of intercarrier revenue).¹⁴ TSTCI believes that in order to ensure equity in the distribution of revenue replacement funds that will result from ICC reform and universal service reform, a local rate benchmark should be developed.¹⁵ However, TSTCI supports a composite local benchmark based upon the nationwide average urban rate plus the current subscriber line charge (SLC) rates as proposed by the Rural Alliance in the ICC proceeding.¹⁶ TSTCI does not agree that 125% of the national average urban rate is the proper benchmark; the percentage seems arbitrary and perhaps too high for low-income states. Should the Commission determine that the appropriate benchmark should be 125% of the national average urban rate, TSTCI recommends the Commission establish a transition to the benchmark. A transition is important in that it allows time for customers, as well as the companies, to adjust to higher rate levels.

E. Distinctions Between Rural Carrier and Non-Rural Carrier Support Should Not Be Eliminated

Some of the plans make no distinction between rural and non-rural carrier support.¹⁷

TSTCI opposes eliminating this distinction. Congress envisioned this distinction when it enacted the Telecommunications Act of 1996 and this distinction has been well documented by the Rural Task Force, previous Joint Boards, and the FCC. There has been no change that would warrant eliminating the distinctions between rural and non-rural.

Distribution of support funds to non-rural carriers is counter to the overriding objective of controlling the growth of support funds.

¹⁴ HIP plan, page 15; USERP plan, page 22

¹⁵ TSTCI supports that concept of allowing the companies to impute the local benchmark.

¹⁶ Further Notice of Proposed Rulemaking, Comments of the Rural Alliance, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, May 23, 2005

¹⁷ USERP page 25; HIP page 16

IV. Conclusion

TSTCI appreciates the efforts of the Joint Board and state staff members in devoting their time to such a significant issue for rural customers and the rural companies providing service. TSTCI recognizes the high cost support funds have been growing substantially over the past few years and that this growth needs to be curtailed. However, TSTCI does not believe a wholesale change in distribution methodology and costing methodologies resolves the primary issue which is the growth of the fund.

Each of the four proposals envision some delegation of universal service allocation and distribution authority to the states. For such delegation to be legally permissible, it is TSTCI's opinion that the delegation must meet the eight-part test as expressed by the Texas Supreme Court and outlined in these comments. Very specific rules must be adopted to increase certainty among the parties of a consistent method of determining allocations and distributing support.

State allocation plans may also be more costly and burdensome to administer than the current mechanism, placing the Commission in the role of regulating and auditing the states to ensure accountability and compliance.

TSTCI is concerned that the "block grants" proposals coupled with possible changes to the costing methodologies will discourage investment in rural areas. The use of block grants creates uncertainty for the rural ILECs, especially if the allocations and distribution of universal service support are to be determined by the states without specific Commission guidelines. Rural companies will be reluctant to make capital investments at the current level if universal service support is not predictable.

The embedded cost methodology is the appropriate measure of the cost of providing service in rural areas, not forward-looking costs. ETCs should be allowed to recover actual costs and support for competitive ETCs should be based upon their own costs, not the costs of rural ILECs.

An ILEC's per-line support should not be frozen upon entry of a competitive ETC, as proposed in the Three Stage Package Reform proposal, as this could result in a funding shortfall for rural ILECs in violation of the statutory provision that support be predictable and sufficient. Such action is also in conflict with recovery of legitimate costs that were lawfully approved by regulators.

A rate benchmark should be based on the composite of a nationwide average urban rate, including the SLC, not the benchmarks proposed. If the Commission should determine that the appropriate benchmark should be 125% of the national average urban rate, TSTCI recommends a transition to the benchmark, to allow time for customers, as well as the companies, to adjust to higher rate levels.

Finally, the distinction between the treatment of rural and non-rural carrier support should not be eliminated. Congress envisioned this distinction when it enacted the Telecommunications Act, and the Rural Task Force, previous Joint Boards, and the FCC have documented this distinction. There has been no change to warrant eliminating it.

TSTCI supports changes that provide a sustainable and predictable fund in accordance with federal law. Support funding should be sufficient to allow the rural companies to continue to provide investments in rural areas.

TSTCI respectfully requests the Joint Board and Commission to tread lightly when making decisions that will impact the financial viability of many rural companies.

TEXAS STATEWIDE TELEPHONE COOPERATIVE, INC.

Big Bend Telephone Company, Inc.
Brazos Telecommunications, Inc.
Brazos Telephone Coop., Inc.
Cameron Telephone Company
Cap Rock Telephone Coop., Inc.
Central Texas Telephone Coop., Inc.
Coleman County Telephone Coop., Inc.
Colorado Valley Telephone Coop., Inc.
Comanche County Telephone Company, Inc.
Community Telephone Company, Inc.
Cumby Telephone Coop., Inc.
Dell Telephone Coop., Inc.
E.N.M.R. Telephone Coop., Inc.
Eastex Telephone Coop., Inc.
Electra Telephone Company
Etex Telephone Coop., Inc.
Five Area Telephone Coop., Inc.
Ganado Telephone Company, Inc.
Industry Telephone Company, Inc.
La Ward Telephone Exchange, Inc.
Lake Livingston Telephone Company
Lipan Telephone Company
Livingston Telephone Company
Mid-Plains Rural Telephone Coop., Inc.
Nortex Communications, Inc.
North Texas Telephone Company
Panhandle Telephone Coop., Inc.
Peoples Telephone Coop., Inc.
Poka Lambro Telephone Coop., Inc.
Riviera Telephone Company, Inc.
Santa Rosa Telephone Coop., Inc.
South Plains Telephone Coop., Inc.
Tatum Telephone Company
Taylor Telephone Coop., Inc.
Wes-Tex Telephone Coop., Inc.
West Plains Telecommunications, Inc.
West Texas Rural Tel. Coop., Inc.
XIT Rural Telephone Coop., Inc.